

12-1-1999

The Treaty of Amsterdam: The Next Step Towards Gender Equality?

Elizabeth F. Defeis

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/iclr>

 Part of the [Comparative and Foreign Law Commons](#), and the [Women Commons](#)

Recommended Citation

Elizabeth F. Defeis, *The Treaty of Amsterdam: The Next Step Towards Gender Equality?*, 23 B.C. Int'l & Comp. L. Rev. 1 (1999), <http://lawdigitalcommons.bc.edu/iclr/vol23/iss1/2>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

THE TREATY OF AMSTERDAM: THE NEXT STEP TOWARDS GENDER EQUALITY?

ELIZABETH F. DEFEIS*

Abstract: *This Article explores the evolution of the European Union's effort to achieve gender equality in employment and the impact of the Amsterdam Treaty on this effort. It examines the developments of the European Union, the legislation promulgated to promote equality between men and women in employment, and the decisions of the European Court of Justice in relation to such legislation. The Article then contrasts those efforts with United States law and focuses on positive action in the European Union, analyzes the relevant decisions in this area—Kalanke v. Freie Hansestadt Bremen and Marschall v. Land Nordrhein-Westfalen. It then contrasts them with the United States experience with affirmative action. Finally, the Article discusses the Amsterdam Treaty and both its impact on equality between men and women in employment and beyond the workplace through positive action. The likelihood of success of the Amsterdam Treaty in eradicating gender discrimination and promoting equal treatment between men and women is assessed.*

* Professor of Law, Seton Hall University School of Law. Professor Defeis would like to thank her research assistants Kristen M. Jasket and Christina E. Giallourakis, Class of 2000.

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.¹

INTRODUCTION

When the European Union (EU) was established in 1957, its focus was on economic integration, not protecting human rights. Because of their common heritage of political ideals, freedom and the rule of law, EU Member States, along with several other European states, had earlier adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms and had provided for an elaborate enforcement mechanism for the protection of human rights through what is known as the Strasbourg process.²

Although the Treaty of Rome (EC Treaty)³ contains a social chapter which deals with human rights to some extent and guarantees workers' rights, its primary goal is to improve working conditions and standards of living on a harmonized basis throughout the EU. But from its very inception, the EU has embodied the principle of gender equality, at least concerning equal pay for men and women in employment. Article 141 of the EC Treaty provides that women should

¹ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. (C 340) [hereinafter Amsterdam Treaty], incorporated into the TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992), art. 141(4) (as in effect in 1999) [hereinafter EC TREATY]. As of May 1999, the Amsterdam Treaty's provisions have been incorporated into both the EC Treaty and the Treaty on European Union. Citations to the EC Treaty and the Treaty on European Union reflect the 1999 incorporations.

² European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 220 [hereinafter Convention]. The European Court of Human Rights and the European Commission of Human Rights sit in Strasbourg, and individuals, as well as Member States, may take complaints of human rights violations directly before the court. Jurisdiction over Member States is compulsory. All Member States of the EU and most potential members, such as Russia and Macedonia, have ratified the Convention. The European Court of Human Rights is separate and apart from the European Court of Justice (ECJ) and the other mechanisms of the EU, such as the Commission and the Council. See Peter Leuprecht, *Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 313 (1998).

³ Treaty of Rome, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter EEC Treaty]. The EEC Treaty is also known as the Treaty Establishing the European Economic Community and the Treaty Establishing the European Atomic Energy Community.

“receive equal pay for equal work.”⁴ This provision is, of course, in stark contrast to the United States Constitution, which to this day contains no textual commitment to gender equality.⁵ In 1975, the Council adopted the Equal Pay Directive (EPD), which supplemented Article 141 by requiring equal pay for “work to which equal value is attributed.”⁶ Shortly thereafter, in 1976, the Council adopted the Equal Treatment Directive (ETD), which expanded the scope of Article 141 by establishing the principle of equal treatment regarding access to employment and sanctioning positive action programs.⁷ These powerful directives, coupled with subsequent treaty amendments and decisions of the European Court of Justice (ECJ) sensitive to human rights concerns, have established a jurisprudence of human rights within the EU.

The Treaty of Amsterdam (Amsterdam Treaty)⁸ aims to integrate respect for human rights and fundamental freedoms into the formal structure of the EU. It also strengthens and focuses the European commitment to gender equality and extends the equality principle of Article 141 beyond the workplace. As a result, the EU itself now has a general obligation in all of its actions not only to strive to eliminate inequalities but also to advocate equality between men and women.⁹

Unfortunately, it is generally acknowledged that the Amsterdam Treaty has not been successful in fulfilling its other goals of reforming the cumbersome institutional structure of the EU and addressing the democracy deficit.¹⁰ Whether the Amsterdam Treaty’s provisions per-

⁴ EC TREATY, *supra* note 1, art. 141.

⁵ The United States Constitution contained no equality provision until the adoption of the Fourteenth Amendment in 1868. The effectiveness of this provision, even as applied to its core purpose—race—was virtually nonexistent until the latter half of this century. Gender discrimination was excluded from its scope until 1971, and even today, its effectiveness with respect to gender discrimination is limited. Thus, the equality principle in the United States is not as powerful a force as it is in the EU.

⁶ Council Directive 75/117, 1975 O.J. (L 45) 19.

⁷ See Council Directive 76/207, 1976 O.J. (L 39) 40.

⁸ EC TREATY, *supra* note 1, art. 141(4). The fifteen Member States negotiated the Amsterdam Treaty during an Intergovernmental Conference beginning in March 1996. See Youri Devuyt, *European Union: Consolidated Version of the Treaty on European Union and Consolidated Version of the Treaty Establishing the European Community*, 37 I.L.M. 56 (1998). The Amsterdam Treaty contains the amendments to the previous treaties and provides for renumbering of “articles, titles, and sections of the existing Treaty on European Union and of the Treaty establishing the European Community.” *Id.* at 57. The Amsterdam Treaty contains a preamble, fifteen articles, a table of equivalencies, thirteen protocols, fifty-one declarations by the IGC and eight declarations by individual Member States. See *id.* at 56.

⁹ See *White Paper*, at 4.16 (visited Jan. 24, 2000) <<http://www.irlgov.ie/whitepaper/>>.

¹⁰ See Philippe Manin, *The Treaty of Amsterdam*, 4 COLUM. J. EUR. L. 1 (1998).

taining to human rights and gender equality will have a greater substantive impact has yet to be assessed.

This Article explores the evolution of the EU's effort to achieve gender equality in employment and the impact of the Amsterdam Treaty on this effort. Part I examines the development of the EU, the legislation promulgated to promote equality between men and women in employment, and the decisions of the ECJ in relation to such legislation. Part I then contrasts those efforts with United States law. Part II focuses on positive action in the EU, analyzes the relevant decisions in this area—*Kalanke v. Freie Hansestadt Bremen*¹¹ and *Marschall v. Land Nordrhein-Westfalen*,¹² and contrasts them with the United States' experience with affirmative action. Part III discusses the Amsterdam Treaty and both its impact on equality between men and women in employment and beyond the workplace through positive action. Finally, this Article assesses the likelihood of success of the Amsterdam Treaty in eradicating gender discrimination and promoting equal treatment between men and women.

I. DEVELOPMENT OF THE EU AND THE ACTIONS TAKEN TO PROMOTE THE EQUALITY OF MEN AND WOMEN IN EMPLOYMENT

In 1951, Belgium, France, West Germany, Italy, Luxembourg and the Netherlands signed the Treaty of Paris that established the European Coal and Steel Community.¹³ In 1957, the same six countries signed the EC Treaty, which established the European Economic Union. The Paris and Rome treaties are the functional equivalent of a constitution for the EU. The United Kingdom, Ireland and Denmark joined the European Community (now the EU) in 1973; Greece joined in 1981; and Spain and Portugal joined in 1986. In 1992, the Treaty on European Union (TEU), also known as the Treaty of Maastricht, amended the EC Treaty and created what is now known as the EU.¹⁴ The final Member States—Sweden, Finland and Austria—were added in 1995. The following thirteen countries have submitted applications for membership: Hungary, Poland, Estonia, the Czech Re-

¹¹ Case C-450/93, 1995 E.C.R. I-3051, [1996] 1 C.M.L.R. 175 (1995).

¹² Case C-409/95, [1997] All ER (EC) 865 (1997), [1998] CEC (CCH) 152 (1997).

¹³ For a general description of the historical development of the EU, see Eleanor M. Fox, *Vision of Europe: Lessons for the World*, in *EUROPEAN UNION LAW ANTHOLOGY* 1, 9-15 (Karen V. Kole & Anthony D'Amato eds., 1998). See Rebecca Means, *Kalanke v. Freie Hansestadt Bremen: The Significance of the Kalanke Decision on Future Positive Action Programs in the European Union*, 30 VAND. J. TRANSNAT'L L. 1087, 1091 (1997).

¹⁴ Treaty on European Union, Feb. 7, 1992, 31 I.L.M. 247 [hereinafter TEU].

public, Slovenia, Cyprus, Turkey, Malta, Bulgaria, Romania, Latvia, Lithuania and Slovakia.¹⁵ The Amsterdam Treaty, signed in 1997, amends the TEU, the treaties establishing the European Communities (the European Coal and Steel Community, the European Atomic Energy Community and the European Community) and certain related acts.¹⁶

A. Article 141

Article 141 of the EC Treaty is the most powerful provision of its social chapter. It is the only article that imposes a positive duty on Member States, and it has a double aim which is both economic and social.¹⁷ Article 141 obliges member states to "ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work."¹⁸ Article 141 defines "pay" as "the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer."¹⁹ Pay has been interpreted broadly to include occupational pension schemes, temporary post-employment payments, sick benefits, severance allowances and travel concessions.²⁰ Article 141 further provides for equal pay without discrimination, requiring that pay for identical work should be calculated on the same unit of measurement and at the same time rates.²¹

¹⁵ See GEORGE A. BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 4 (Supp. 1998).

¹⁶ See Amsterdam Treaty, *supra* note 1.

¹⁷ See Case 43/75, *Defrenne v. Societe Anonyme Belge de Navigation Aeriennne Sabena*, 1976 E.C.R. 455, 472 [hereinafter *Defrenne II*].

¹⁸ EC TREATY, *supra* note 1, art. 141. "The narrowness of this definition constituted a political compromise and contrasted with that adapted by the International Labour Organization . . . in which equal pay was defined as 'work of equal value.'" JUNE NEILSON, EQUAL OPPORTUNITIES FOR WOMEN IN THE EUROPEAN UNION: SUCCESS OR FAILURE? 64 (U. of Aberdeen, U.K. 1998) (citing Convention No. 100 on Equal Remuneration, 1951).

¹⁹ EC TREATY, *supra* note 1, art. 141.

²⁰ See Case C-33/89, *Kowalska v. Freie und Hansestadt Hamburg*, 1990 E.C.R. I-2591 (temporary post-employment payments); Case 262/88, *Barber v. Guardian Royal Exch. Assurance Group*, 1990 E.C.R. I-1889, [1990] 2 C.M.L.R. 513 (1990) (redundancy payments); Case 171/88, *Rinner-Kuhn v. FWW Spezialgebaudereinigung*, [1993] 2 C.M.L.R. 932 (1989) (maintenance of salary in case of sickness); Case 170/84, *Bilka-Kaufhaus GmbH v. von Hartz*, 1986 E.C.R. 1607, [1986] 2 C.M.L.R. 701 (1986); Case 12/81, *Garland v. British Rail Eng. Ltd.*, 1982 E.C.R. 359, [1982] 1 C.M.L.R. 696 (1982) (voluntary travel concessions for retirees); Case 69/80, *Worringham v. Lloyd's Bank Ltd.*, 1981 E.C.R. 767, [1981] 2 C.M.L.R. 1 (1981) (severance allowances).

²¹ See EC TREATY, *supra* note 1, art. 141.

Article 141 has been the subject of voluminous EU legislation and litigation that has led to an extensive body of case law. Under the constitutional structure of the EU, any state court or tribunal of a Member State may refer a question to the ECJ for a preliminary ruling. In addition, Article 141 allows any individual to refer a question to the ECJ. Many of these questions come from Denmark, Germany, the Netherlands and the United Kingdom due to more effective procedures for attacking discrimination, trade organizations and active rights groups in these states. The constitutional structure has thus enabled individuals and organizations in Member States to pursue test cases to develop the law, even when the outcome is doubtful. Consequently, EU law on sex discrimination in employment may be described as a "mini-constitution."

The precise scope of the equality principle is not static but is constantly in flux, and the ECJ has been extremely influential in developing the principle of equality.²² In 1978, the ECJ declared that "respect for fundamental personal human rights is one of the general principles of Community law. . . . There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights."²³ Thus, the ECJ expanded the equal pay principle into a general equality right between women and men which exists at the core of EU law.²⁴ It has been argued that, although the equality right derives from Article 141 because of its status as primary treaty legislation, Article 141 is not the source. Rather, Chris Docksey has explained that Article 141 "is part of the *implementation* of the principle . . . [and] has been complemented by an advanced Union legislative code . . . [therefore,] . . . all the legislation on equality, both primary and derived, directly embodies and is sustained by the principle of equality."²⁵

²² See *Defrenne II*, *supra* note 17.

²³ Case 149/77, *Defrenne v. Societe Anonyme Belge de Navigation Aeriennne Sabena*, 1978 E.C.R. 1365, 1374 [hereinafter *Defrenne III*].

²⁴ The Council adopted six directives between 1975 and 1992: (1) the EPD of 1975; (2) the ETD of 1976; (3) the 1978 Social Security Directive; (4) the 1986 Directive on equal treatment in occupational social security schemes; (5) the 1986 Directive on equal treatment between men and women engaged in an activity including agriculture in a self-employed capacity and on the protection of self-employed women during pregnancy and motherhood; and (6) the 1992 Directive on the protection of pregnant women from exposure to hazardous substances in the workplace and on rights to maternity leave. See Sonia Mazey, *The European Union and women's rights: from the Europeanization of the national agendas to the nationalization of a European agenda*, J. EUR. PUB. POL'Y 131, 140 (1998).

²⁵ Chris Docksey, *Sex Discrimination*, in EUROPEAN UNION LAW ANTHOLOGY 360, 361 (Karen V. Kole & Anthony D'Amato eds., 1998).

B. *Equal Pay Directive of 1975*

Article 141 is the articulated basis of all other EU legislation regarding equality between men and women in employment. However, it was economic rather than social concerns that led to the inclusion of Article 141 in the EC Treaty.²⁶ At the time, France was the only country in the EU in which workers by law were entitled to equal pay.²⁷ Because France feared its businesses would be competitively under-priced by businesses in other Member States that had no equal pay for men and women requirement, it insisted on the implementation of "equal pay for equal work" for both men and women in all Member States.²⁸

Member States were required to enact their own legislation of "equal pay for equal work" by January 1, 1962.²⁹ Compliance was extended to the end of 1964, because only some Member States had adopted such legislation.³⁰ Even with the extension, not all Member States complied. Infringement proceedings were eventually instituted against all of the Member States that failed to comply.³¹

As a result of the uneven application of Article 141 among Member States, the Council issued the Equal Pay Directive. The EPD of 1975 implemented the equality principle of Article 141 and made Member States' obligations under Article 141 more specific. It incorporated a comparable worth standard by defining equal pay as "the same work or for work to which equal value is attributed"³² and brought the EU in line with the International Labor Convention No.

²⁶ See NEILSON, *supra* note 18, at 65.

²⁷ See George A. BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 1158 (1993).

²⁸ See *id.*

²⁹ See NEILSON, *supra* note 18, at 64.

³⁰ See BERMAN, *supra* note 27, at 1158.

³¹ See NEILSON, *supra* note 18, at 65-67. The Commission noted that "whilst very substantial efforts have been made to give effect to the Directive, considerable areas of uncertainty remain and some elements of the Directive have only been implemented in part." *Id.* at 67.

³² Council Directive 75/117, *supra* note 6. At the time the EPD was enacted

equal-pay legislation existed to some degree only in France . . . Ireland . . . Luxembourg . . . and the United Kingdom. . . . The other member states were thus obliged to enact suitable legislation. However, by February 1976 (the deadline for implementation), Belgium, Germany and Italy had all failed to enact any legislation, while gaps in compliance with the Directive were apparent in the laws of Denmark . . . France, Luxembourg, the Netherlands . . . and the United Kingdom.

NEILSON, *supra* note 18, at 66.

100.³³ The EPD also required that a "job classification system" be nondiscriminatory in character;³⁴ called for the abolition of all gender discrimination resulting from existing laws or provisions, and required protection for employees who had lodged a complaint based on the EPD.³⁵

Under the EPD, Member States must assure that both collective bargaining agreements applicable to industry and private employment contracts abide by the equal pay principle. They must also generally "ensure that the principle of equal pay is applied," establish judicial procedures to enable enforcement, and inform employees of these rights "at their place of employment."³⁶

Shortly after the enactment of the EPD, an action was brought in the Belgian courts by Defrenne, an employee of Sabena, who claimed that Sabena's practice of paying the male cabin stewards more than the female cabin stewards violated Article 141.³⁷ The Labor Court of Brussels referred the case to the ECJ for a preliminary ruling.

In *Defrenne II*, the ECJ ruled that Article 141 had a "direct effect"³⁸ in Member States and that an individual had a right to sue not only Member States or one of their instrumentalities but also private actors in state courts, whether or not domestic legislation implement-

³³ See NEILSON, *supra* note 18, at 66.

³⁴ See Council Directive 75/117, *supra* note 6.

³⁵ See *id.* No sanctions were imposed "against an employer who dismissed an employee for instituting a legal claim" or against an employer who otherwise infringed on the EPD. NEILSON, *supra* note 18, at 66.

³⁶ See Council Directive 75/117.

³⁷ See *Defrenne II*, *supra* note 17, at 471.

³⁸ Although Article 141 was to have a direct effect on claims accruing from the date of the ECJ's judgment and on claims already filed, the direct effect of Article 141 was not to be given retroactive effect. See *id.* at 481.

[I]t is appropriate to take exceptionality into account the fact that, over a prolonged period, the parties concerned have been led to continue in practices which were contrary to Article 119 [now Article 141], although not yet prohibited under their national law. . . . In these circumstances, it is appropriate to determine that, as the general level at which pay would have been fixed cannot be known, important considerations of legal certainty affecting all the interests involved, both public and private, make it impossible in principle to reopen the question as regards the past. Therefore, the direct effect of Article 119 [now Article 141] cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment, except as regards those workers who have already brought legal proceedings or made an equivalent claim.

ing Article 141 existed.³⁹ The ECJ distinguished between the direct discrimination resulting from violating the principle of equal pay for equal work and indirect or disguised discrimination, and limited direct effect to cases of direct discrimination. Because the ECJ held that Article 141 has both a direct effect and a vertical effect and thus reaches private obligations, its impact on equality has been substantial.

The United States, however, has taken a different approach with respect to wage equity. Unlike the EU approach, equal pay for work of comparable value is not specifically authorized by United States federal legislation, and indeed, in the United States, comparable worth continues to be very controversial. The United States Equal Pay Act of 1963 (EPA)⁴⁰ was enacted to address the national and international problem caused by paying women less than men for the same work. It requires equal pay for work that is performed under similar working conditions and that demands the same skill, effort and responsibility. Although a claim for equal pay for work of comparable worth cannot be brought under the EPA, in 1981 the United States Supreme Court in *County of Washington v. Gunther*⁴¹ held that under some circumstances women who perform work not equal to, but comparable to, that performed by men can bring a claim against their employers based on sex-based wage discrimination.

In *Gunther*, female prison guards brought a Title VII claim against their county employer for wage discrimination because male prison guards were paid higher wages. The plaintiffs argued that they were paid less for work that was substantially equal to that of male guards, and alternatively, that the county intentionally discriminated against the female guards because of their sex. The female guards based the latter claim on the fact that after conducting a survey of the market value of the job, the county increased the salary of male guards to reflect the survey but left the salary of female guards unchanged.

In upholding the claim, the Court was clear to point out that the claim was not based on what it called "the controversial concept of

³⁹ See *id.* at 476. The ECJ noted its frustration with the "failure of Member States to implement directives created to ensure that discriminatory laws were in place within the Member States' borders." Laura Molinari, *The Effect of the Kalanke Decision on the European Union: A Decision with Teeth but Little Bite*, 71 ST. JOHN'S L. REV. 591, 610 (1997) (citing Taline Aharonian, *Equal Value in the European Union: Fiction or Reality?*, 2 BUFF. J. INT'L L. 91, 110 (1995)).

⁴⁰ 29 U.S.C.A. § 206 (West 1982).

⁴¹ 452 U.S. 161 (1981).

comparable worth"⁴² but rather on intentional discrimination. The intentional discrimination consisted of setting the female wage scale at a lower level than that set out in the county's own survey while at the same time adjusting the male guards' salary to the prevailing higher survey level. The Court did not explain how sex-based wage discrimination litigation under Title VII should be structured. It did, however, seem to open the door to claims of wage discrimination based on comparable worth.⁴³

Overall, asserting comparable worth as a litigation strategy has not been successful in the United States. When considering comparable worth claims, United States courts have focused on whether the employer was in fact paying market wages and have overlooked the fact that by paying such market wages, employers may be exploiting societal biases, stereotypes and past discrimination.⁴⁴

The ECJ, on the other hand, has been less receptive to the argument that market forces justify wage disparities.⁴⁵ Together with the Commission, the ECJ has been forceful in regulating and providing guidance to implement the comparable worth standard throughout the EU. Despite such efforts, wage disparities continue to exist in the EU. One EUROSTAT survey conducted in four Member States reveals that women's salaries are still lagging. Women's hourly earnings in relation to men's are only 84% in Sweden, 73% in France and Spain and 64% in the U.K. (these figures are for full-time and part-time workers but do not include earnings for overtime).⁴⁶

There are now efforts in the United States to address comparable worth that would bring equal pay issues more in line with the EU model. In 1997, the Fair Pay Act was introduced into the United

⁴² *Id.* at 166. The Court further explained that

[a]ll we know is that Title VII provides a remedy when, as here, plaintiffs seek to show by direct evidence that their employer intentionally depressed their wages. And, for reasons that go largely unexplained, we also know that a Title VII remedy may not be available to plaintiffs who allege theories different than that alleged here, such as the so-called "comparable worth" theory.

Id. at 183.

⁴³ The Court explicitly stated that "[t]he opinion does not endorse [the] so-called 'comparable worth' theory; though the Court does not indicate how a plaintiff might establish a prima facie case under Title VII." *Id.* at 203.

⁴⁴ See *American Nurses' Ass'n v. Illinois*, 783 F.2d 716 (7th Cir. 1986); *Spaulding v. University of Wash.*, 740 F.2d 686 (9th Cir. 1984).

⁴⁵ See Case C-127/92, *Enderby v. Frenchay Health Authority*, [1994] 1 C.M.L.R. 8 (1993).

⁴⁶ See *Women: Equal Opportunities*, (visited Nov. 1, 1999) <<http://eur-op.eu.int/en/opnews/497/r374.htm>>.

States Congress to address comparable worth. It was designed to "provide for equal pay for work in jobs that are comparable in skill, effort, responsibility and working conditions"⁴⁷ and to prohibit employers from paying wages to employees "at a rate less than the rate at which the employer pays wages to employees . . . in another job that is dominated by employees of the opposite sex . . . for work on equivalent jobs."⁴⁸ The bill was based upon a congressional finding that "wage rate differentials exist between equivalent jobs segregated by sex, race, and national origin" and that "discrimination in hiring and promotion has played a role in maintaining a segregated work force."⁴⁹ The Fair Pay Act was reintroduced in Congress in March 1999.⁵⁰ If enacted, the Act would bring the United States closer both to the EU model and to wage equity.

C. *Equal Treatment Directive of 1976*

Experience in the United States demonstrated that equal pay provisions were insufficient to create equality in the workplace. Consequently, the Equal Pay Act of 1963 was followed by Title VII of the Civil Rights Act of 1964 which prohibits discrimination in employment in general. Similarly, in the EU, it became apparent that something more than wage equity was required to achieve gender equality in employment. For example, two years after challenging Sabena's discriminatory pay policy, Defrenne brought another suit claiming that Sabena's forced retirement of female, but not male, stewards at age forty violated Article 141.⁵¹ The ECJ ruled that Article 141 pertained only to equal pay and could not support a claim for equal treatment. The Court defined the limits of Article 141 as relating to "pay discrimination between men and women workers."⁵² As a result, the EPD was followed one year later by the ETD.⁵³

Article 1 of the ETD addresses gender discrimination in "access to employment, including promotion[s], and . . . vocational training and as regards working conditions."⁵⁴ Article 2 further declares that

⁴⁷ 143 CONG. REC. S804-03, (daily ed. Jan. 29, 1997) (statement of Sen. Tom Harkin).

⁴⁸ S. 232, 105th Cong., 1st Sess. (1997).

⁴⁹ *Id.*

⁵⁰ 145 CONG. REC. E545 (daily ed. Mar. 24, 1999) (statement of Sen. Eleanor Holmes Norton).

⁵¹ See *Defrenne III*, *supra* note 23, at 1376.

⁵² *Id.*

⁵³ See Council Directive 76/207, *supra* note 7.

⁵⁴ *Id.*

"the principal of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status."⁵⁵

The ETD does, however, allow for derogation in three instances. Article 2(2) allows employers to discriminate on grounds of sex if sex "constitutes a determining factor" in the nature or context of the job.⁵⁶ Article 2(3) sanctions protective treatment regarding pregnancy and maternity, while Article 2(4) permits positive action programs for women to promote equal opportunity.⁵⁷ Article 2(4) states that it "shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1)."⁵⁸

Like the EPD, the ETD required Member States to implement the directive and to eliminate any current regulations or laws contrary to the principles embodied in the ETD.⁵⁹ Also similar to the EPD, Member States were not quick to implement the ETD into their laws and eventually were forced to comply.⁶⁰ Although implementation of the EPD and ETD lagged, both directives raised European awareness of gender issues in employment and accelerated the evolution of "equal pay for equal work" from an economic goal to the broad-based social goal of equality.⁶¹

⁵⁵ *Id.*

⁵⁶ See *id.* This limitation in the ETD can be paralleled to the narrowly interpreted Title VII bona fide occupational qualification (BFOQ) which permits an employer to hire on the basis of religion, sex or national origin where those qualities become a bona fide occupational qualification reasonably necessary to the normal operation of the business. See 42 U.S.C.A. § 2000e-2(c); see also 29 C.F.R. § 1604.2. To warrant this exception, the employer must prove that the factors used to determine whether gender is a determining factor are objective. See Elena Noel, *Prevention of Gender Discrimination Within the European Union*, 9 N.Y. INT'L L. REV. 77, 86 (1996). In addition, for this exception to apply, the risk faced by a woman must be higher than the risk faced by a man rather than mere public opinion that favors protection for women. See *id.* at 86-87; see also Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986 E.C.R. 1651.

⁵⁷ See Council Directive 76/207, *supra* note 7.

⁵⁸ *Id.*

⁵⁹ See *id.* art. 5(2)(b).

⁶⁰ See NEILSON, *supra* note 18, at 67.

⁶¹ This is further evidenced by the fact that in 1984, the Council adopted the Commission's recommendation that Article 2(4) of the ETD should approve positive action programs favoring women. See Communication from the Commission to the European Parliament and the Council on the interpretation of the judgment of the Court of Justice on 17 October 1995 in Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, COM(96)88 final, at 3 (citing Council Recommendation 84/635 EEC on the Promotion of Positive Action for Women, 1984 O.J. (L 331) 34) [hereinafter Communication on the Kalanke Rul-

Even though the equality principle of Article 2 allows for derogation in three instances, most cases initially focused on the derogation in Article 2(3) dealing with the protection of women regarding pregnancy and maternity. For example, in *Hofmann v. Ersatzkasse*,⁶² which involved the German Law for the Protection of Working Mothers,⁶³ mothers were entitled to a "compulsory convalescence period of eight weeks' leave after childbirth" and a "maternity leave" to commence at the end of the convalescence period and to end when the baby reached six months of age.⁶⁴ At the end of this period, the mother would be entitled to return to her job under previous conditions.⁶⁵

The plaintiff, Hofmann, acknowledged paternity of his illegitimate child and obtained unpaid leave from his job for the period after the eight weeks' maternity leave had expired until the child reached six months. His application for paid maternity benefits was refused on the grounds that only "mothers" were able to receive such compensation.⁶⁶ He appealed the refusal as contrary to the equality rights guaranteed by the ETD⁶⁷ and further claimed that the decision as to who would assume responsibility for the child's care should be left to the parents.⁶⁸

The ECJ rejected Hofmann's challenge and ruled that Member States were not required to provide benefits to fathers of newborn children even if a father actually assumed responsibility for the child's rearing.⁶⁹ The ECJ held that one of the legitimate intents of the Directive, particularly under Article 2(3), was to protect a woman's physical and mental health both during and after pregnancy and to protect the relationship a mother forms with her child by keeping it unhampered by simultaneous employment constraints.⁷⁰ Finally, the

ing]. The recommendation encouraged Member States to create positive action programs to remedy existing inequalities plaguing women in the labor force and to achieve a balance between men and women in employment. *See id.*

⁶² Case 184/83, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,117 (1984).

⁶³ The German law is also known as Gesetz zum Schutz der Erwerbstätigen Mutter.

⁶⁴ Case 184/83, *supra* note 62, at 15,499.

⁶⁵ *See id.*

⁶⁶ *See id.* at 15,499-500. Such a ruling is justified because a mother alone suffers physical conditions resulting from a pregnancy. *See id.* at 15,500. Hofmann argued that the focus of the law should be on the care the child receives, rather than on the health of the mother. *See id.*

⁶⁷ *See id.*; *see also* Directive 76/207, *supra* note 7, arts. 2(3) and 5(1).

⁶⁸ *See* Case 184/83, *supra* note 62, at 15,514.

⁶⁹ *See id.* at 15,516; *see also* Gabriel Moens, *Equal Opportunities Not Equal Results: "Equal Opportunity" in European Law After Kalanke*, 23 J. LEGIS. 43, 47 (1997).

⁷⁰ *See* Case 184/83, *supra* note 62, at 15,515.

Court stated that a woman is entitled to legal protection to avoid conflicting duties between maintaining employment and raising a child.⁷¹

Protective legislation for women was also tested in *Commission v. France*,⁷² which involved the redrafted French Labour Code. The redrafted Labour Code provided "that any term reserving the benefit of any measure to employees on grounds of sex included in any collective labour agreement shall be void, except where such a clause is intended to implement the provisions relating to pregnancy, nursing or pre-natal and post-natal rest."⁷³ The Labour Code allowed for collective agreements or contracts to grant special rights to women.⁷⁴ Some of these "special rights" included a Mother's Day holiday, shorter work hours for women older than 59 years, extra days off from work for each child, an earlier retirement age, periodic breaks for women who are typists or switchboard operators or who work on computers, and additional maternity leave beyond the usual period.⁷⁵ Although some of these measures can be justified under Articles 2(3) and 2(4), the ECJ held that the overall effect of these rights is not justified under these articles of the ETD for an indefinite period.⁷⁶

The United States' position on protective legislation for women has been problematic. While Title VII of the Civil Rights Act has been interpreted to bar protective legislation solely for women, federal legislation now prohibits discrimination based on pregnancy. In *Geduldig v. Aiello*, the Supreme Court sustained a California disability insurance program which excluded any disability caused by or arising in connection with pregnancy.⁷⁷ The Court refused to view the program as discriminating on the basis of gender under the Equal Protection Clause.⁷⁸ Conversely, the EEOC in 1972 determined that employment policies relating to pregnancy were discriminatory and issued guidelines which brought differential treatment of pregnancy under Title VII's prohibition on sex discrimination.⁷⁹ In *General Electric Co. v.*

⁷¹ See *id.* at 15,514. Advocate General Darmon also reiterated that Member States were solely responsible for the measures enacted to guarantee the protection of women following childbirth and to prevent any disadvantages they may suffer in the work force due to a maternity leave. See *id.* at 15,515. In view of social developments since that time, it is unlikely that the ECJ would reach the same result today.

⁷² Case C-312/86, 1988 E.C.R. 6315, [1989] 1 C.M.L.R. 408 (1988).

⁷³ *Id.* ¶ 3.

⁷⁴ See *id.* ¶ 8.

⁷⁵ See *id.*

⁷⁶ See *id.* ¶ 9.

⁷⁷ See *Geduldig v. Aiello*, 417 U.S. 484 (1974).

⁷⁸ *Id.* at 496-97 n.20.

⁷⁹ See 29 C.F.R. § 1604.10 (1985).

Gilbert, however, the Court repudiated the applicable EEOC guidelines and held that an employer's exclusion of pregnancy-related disabilities from the coverage of an employee's disability income plan did not constitute sex discrimination proscribed by Title VII.⁸⁰ In response, Congress enacted the Pregnancy Discrimination Act.⁸¹ Under the Act, employers are not required to provide maternity benefits, but if they provide medical or disability benefits, they cannot exclude pregnancy. Congress later enacted the Family and Medical Leave Act⁸² which is at least a small step towards the EU model.

The ETD's Article 2(2) provision allowing an employer to discriminate by gender if sex "constitutes a determining factor" in the nature or context of the job has been narrowly construed. In those instances where neither maternity nor pregnancy are involved, the ECJ has been less willing to recognize an exception to the equality principle. To warrant this exception, the employer must prove that the criteria used to determine whether gender is a determining factor are objective. In one such case, *Johnston v. RUC*, the United Kingdom argued unsuccessfully that there is a general derogation implicit in the EC Treaty for all measures covering public safety.⁸³ The ECJ held that for this exception to apply, the risk faced by a woman must be higher than the risk faced by a man, rather than mere public opinion that favors protection for women. The Court explained that the exception derogates from the principle of equality and must be strictly construed.⁸⁴

A second case involving the scope of the Article 2(2) exception, *Sirdar v. Army Board*,⁸⁵ is now pending before the ECJ. It involves the application of a woman who served in the Catering Corps of the British Army as a chef from 1983 until 1995 when she was made redun-

⁸⁰ 429 U.S. 125, 145-46 (1976).

⁸¹ 42 U.S.C.A. § 2000e *et seq.* (West 1993).

⁸² 5 U.S.C.A. § 6381 *et seq.*; 29 U.S.C.A. § 2601 *et seq.* (West 1993).

⁸³ Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986 E.C.R. 1651, [1986] 3 C.M.L.R. 240 (1986).

⁸⁴ The court held, however, that:

public safety may justify a derogation under Article 2(2), if it is proved to be necessary in the specific case, and if it conforms to the principle of proportionality. That principle requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view and requires the principle of equal treatment to be reconciled as far as possible with the requirements of that [aim].

Id. at 368.

⁸⁵ Opinion of Advocate General La Pergola, Case C-273/97 (May 18, 1999).

dant and was offered a transfer to the Royal Marines. When it was found she was a woman, the offer was withdrawn because the Royal Marines exclude women on the grounds of inter-operability—the need for a Marine to be able to fight as a commando regardless of specialization. The Industrial Tribunal found that the Royal Marines are a small (2% of the British armed forces) and combat-ready fighting force. According to the principle of “inter-operability,” Royal Marines are all trained as commandos and are required to participate in front-line activity at any time. The case has been referred to the ECJ for it to consider whether this situation qualifies as an exception under Article 2(2) of the ETD or under Article 224 (now Article 297) of the EC Treaty.

The ETD Article 2(2) exception is similar to the United States bona fide occupational qualification (BFOQ) exception in the Civil Rights Act of 1964. Title VII of the Act is the most comprehensive and effective federal legislation dealing with gender discrimination—much more expansive than the Equal Pay Act which is limited to wage discrimination. Title VII prohibits discrimination in all terms and conditions of employment on the basis of race, color, religion, national origin or sex.⁸⁶ It protects the rights of persons to obtain and hold a job, as well as the right to equal treatment once the job has been obtained, and covers employers with fifteen or more workers.⁸⁷ Similar to the EU model, Title VII does allow for discrimination based on sex if sex is a bona fide occupational qualification of the job, but this exception has been narrowly construed and permitted in very few instances. In the only case considered by the United States Supreme Court concerning the BFOQ exception, the Court upheld the exception, but concluded that it should be construed narrowly. The State of Alabama was allowed to exclude women from serving as prison guards because of the risk of sexual assault from prisoners and

⁸⁶ 42 U.S.C.A. § 2000e-2(a).

It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such an individual's race, color, religion, sex, or national origin.

Id.

⁸⁷ 42 U.S.C.A. § 2000e-(b). “The term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.” *Id.*

of the risk of sexual assault from prisoners and a general concern for prison security.⁸⁸

II. POSITIVE ACTION IN THE EU

The ECJ has given substance to, and has been strict in enforcing, the principle of "equal pay for equal work." Nevertheless, it has followed an unsteady course with respect to positive action programs. Article 2(4) of the ETD permits, but does not require Member States to adopt positive action measures.⁸⁹ It provides that the principle of nondiscrimination "shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities."⁹⁰ Although there is no official definition of positive action, there is a consensus in the EU that "the concept of positive action embraces all measures which aim to counter the effects of past discrimination, to eliminate existing discrimination and to promote equality of opportunity between women and men, particularly in relation to types or levels of jobs where members of one sex are significantly under-represented."⁹¹ The Council has identified a wide range of positive action measures which can be adopted, including goals and timetables. Two recent cases dealing with positive action provisions indicate the difficulty that the ECJ has had with crafting a coherent jurisprudence with respect to positive action programs.

A. *Kalanke v. Freie Hansestadt Bremen*

In *Kalanke v. Freie Hansestadt Bremen*, Kalanke sued on grounds of sex discrimination when pursuant to a German law, he was passed over for employment in favor of an equally qualified female co-worker.⁹² The German law provided:

[i]n the case of an appointment . . . [or] . . . assignment to a position in a higher pay, remuneration and salary bracket, women who have the same qualifications as men applying for the same post are to be given priority if they are under-represented. . . . There is under-representation if women do

⁸⁸ See *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

⁸⁹ Several Member States have adopted positive action programs including Belgium, France, Germany, the Netherlands and the U.K. See Means, *supra* note 13, at 1116-17.

⁹⁰ Council Directive 76/207, *supra* note 7.

⁹¹ Communication on the Kalanke Ruling, *supra* note 61.

⁹² See Case C-450/93, *supra* note 11.

not make up at least half of the staff in the individual pay, remuneration and salary brackets in the relevant personnel group within a department.⁹³

The Bundesarbeitsgericht, also known as the Federal Labour Court, referred the case to the ECJ for a preliminary ruling.

The ECJ acknowledged that the German law is "designed to allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life."⁹⁴ Nonetheless, the ECJ held that the German law, whose aim is to "guarantee women absolute and unconditional priority for appointment or promotion go[es] beyond promoting equal opportunities and overstep[s] the limits of the exception in Article 2(4) of the Directive."⁹⁵ In addition, the ECJ stated "in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, such a system substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity."⁹⁶

No doubt the ECJ was influenced by the comprehensive opinion of Advocate General Tesauro,⁹⁷ who reviewed the rationale for positive action and cited numerous United States sources.⁹⁸ Advocate General Tesauro noted that positive action attempts to eliminate the obstacles affecting a particular disadvantaged category of individuals in the labor market.⁹⁹ He recognized the necessity for positive action programs and described positive action programs as "a means of achieving *equal opportunities* for minority or . . . disadvantaged groups, which generally takes place through the granting of preferential treatment to the groups in question" for "a collective vision of equal-

⁹³ *Id.* at 191.

⁹⁴ *Id.* at 193-94 (citing Case 312/86, *Commission v. France*, 1988 E.C.R. 6315, [1989] 1 C.M.L.R. 408 (1988), ¶ 15).

⁹⁵ *Id.* at 194.

⁹⁶ *Id.*

⁹⁷ The Advocate General's opinion is not binding on the ECJ or Member States, but the decision of the panel of judges of the ECJ is binding. See *German Sex Bias Rules "Unlawful,"* FIN. TIMES, May 27, 1997, at 29 [hereinafter *German Sex Bias Rules*].

⁹⁸ See Opinion of Advocate General Giuseppe Tesauro, Case C-450/93, 1995 E.C.R. I-3051, [1996] 1 C.M.L.R. 175 (1995), at 182 n.10 [hereinafter *Tesauro Opinion*].

⁹⁹ See *id.* at 181-82.

ity.”¹⁰⁰ Advocate General Tesauro then listed three forms of positive action.

The first form of positive action attempts to remove the cause of fewer employment and career opportunities offered to women.¹⁰¹ Vocational guidance and training further this objective.¹⁰² The second form addresses the dual responsibilities that women face raising a family and maintaining a career and the difficulty of sharing these responsibilities with men.¹⁰³ Providing flexible working hours, developing child-care programs, and allowing mothers who have devoted significant years to child-rearing to return to work are a few examples of how to distribute responsibilities between the sexes.¹⁰⁴ These two forms of positive action aim to achieve “*equal opportunities*” and “*substantive equality*.”¹⁰⁵ With either model the results are not immediate.¹⁰⁶

The third form of positive action, the type of positive action questioned in *Kalanke*, is remedial and addresses the continuing effects of historical discrimination.¹⁰⁷ This form of positive action “takes on a compensatory nature, with the result that preferential treatment in favour of disadvantaged categories is legitimised, in particular through systems of quotas and goals.”¹⁰⁸ Advocate General Tesauro rejected this form of positive action and limited the scope of Article 2(4) to permit positive action programs only so far as they “promote and achieve equal opportunities” between the sexes by removing all current barriers affecting the employment opportunities of women.¹⁰⁹

¹⁰⁰ *Id.* at 181 (emphasis added); see Moens, *supra* note 69, at 44. Moens defines “equality of opportunity” as allowing “individuals to compete for employment solely on the basis of characteristics relevant to satisfactory performance, and not on the basis of generally extraneous factors such as sex or race.” *Id.* “Equality of result” is the “belief that a ‘nearly random distribution of women or other minorities in all jobs’ would be expected to occur in the absence of discriminatory practices.” *Id.* at 45 (citing Lance W. Roberts, *Understanding Affirmative Action*, in DISCRIMINATION, AFFIRMATIVE ACTION, AND EQUAL OPPORTUNITY 145, 157 (W.E. Block & M.A. Walker eds., 1982)).

¹⁰¹ See Tesauro Opinion, *supra* note 98, at 181.

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ *Id.* at 182. Advocate General Tesauro defined “substantive equality” as a “positive concept by basing itself precisely on the relevance of those different factors themselves in order to legitimise an unequal right, which is to be used in order to achieve equality as between persons who are regarded not as neutral but having regard to their differences.” Tesauro Opinion, *supra* note 98, at 185.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* at 182. It is this third form that has come under the most attack. See *id.*

¹⁰⁸ *Id.*

¹⁰⁹ See Tesauro Opinion, *supra* note 98, at 183. Advocate General Tesauro rejected the German law based on his belief of the concept of equal opportunities within the ETD. He

Advocate General Tesauro defined equal opportunities to mean the same "starting points"¹¹⁰ and concluded that since the two candidates were of equal qualifications, they were at the same "starting point." He decided that the German rule "manifestly and unquestionably conflicts with the principle of equal treatment as defined in Article 2(1)" and "is not caught by the exception contained in Article 2(4) of the directive, since, far from fostering equal opportunities for women, it aims to confer the results on them directly."¹¹¹

The *Kalanke* decision was met with much criticism throughout the EU from legal commentators as well as from the Commission.¹¹² The Commission issued an interpretive communication which first noted that equality of opportunity for women is a "task of paramount importance."¹¹³ It then surveyed the United States case law on affirmative action and stated that the *Kalanke* decision should be interpreted narrowly. It set forth a range of actions that Member States can take with respect to positive actions that are consistent with *Kalanke*.¹¹⁴ These include goals and timetables but not a rigid quota system in which women are given automatic preference over men.¹¹⁵ The Commission emphasized the need for continuing positive action measures, and in doing so, stated that quota systems, which are not

believed that "giving equal opportunities can only mean putting people in a position to attain equal results and hence restoring conditions of equality as between members of the two sexes as regards starting points." *Id.* Therefore, in order to obtain equal opportunities, to create "starting points," the barriers affecting the employment opportunities of women must be identified and then removed. *See id.*

¹¹⁰ Advocate General Tesauro cautioned that creating equal "starting points" will not achieve the equality sought; rather, other influences, such as the dual role of women as mothers and employees and past discrimination, need to be considered when the number of women in a particular field of employment is marginal. *See id.* at 184.

¹¹¹ *Id.* at 189. Advocate General Tesauro acknowledged the existence of opposition to his view and in favor of such legislation, but stated that this "trend" is not the proper trend for the ECJ to follow. *See* Tesauro Opinion, *supra* note 98, at 189. He further stated that any attempt to equalize the representation of women by simply using numerical levels as the basis will be insufficient unless the numerical levels are accompanied by measures specifically tailored to reach equality. *See id.* at 190. He concluded that there is a need for a significant alteration in the social, economic and cultural basis of the European Community that allows such inequalities to continue. *See id.*

¹¹² *See* Sara Moore, *Nothing Positive from the Court of Justice*, 21 EUR. L. REV. 156 (1996); Linda Senden, *Positive Action in the EU Put to the Test: A Negative Score?*, 3 MAASTRICHT J. EUR. & COMP. L. 146 (1996). *But see* Eric F. Hinton, *The Limits of Affirmative Action in the European Union: Echaard Kalanke v. Freie Hansestadt Bremen*, 6 TEXAS J. WOMEN & L. 215 (1997).

¹¹³ Communication on the *Kalanke* Ruling, *supra* note 61, at 2. The Commission has always adopted a very favorable attitude towards positive action. *See id.*

¹¹⁴ *See id.* at 3.

¹¹⁵ *See id.*

automatic, remain unaffected by the ECJ's ruling.¹¹⁶ It further recommended that the ETD be amended to specifically provide that positive action is permitted where one sex is underrepresented, provided that the employer can consider the particular circumstances of each case.

B. Marschall v. Land Nordrhein-Westfalen

Two years later, the ECJ was given the opportunity to expand and to clarify its position on affirmative action in *Marschall v. Land Nordrhein-Westfalen*.¹¹⁷ In that case, Marschall challenged the German rule that provided:

[w]here, in the sector of the authority responsible for promotion, there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to an individual [male] candidate tilt the balance in his favour.¹¹⁸

As in *Kalanke*, it was undisputed that both the female and male candidates were equally qualified and that the female candidate was appointed because of the preference in the law.¹¹⁹ The Verwaltungsgericht, otherwise known as the Administrative Court, referred the case to the ECJ on the question of whether the national rule was within the scope of the ETD.¹²⁰ Two Member States, France and the United Kingdom, urged that the *Kalanke* rule be applied. The Commission and four Member States argued that the German law was consistent with the equality principle.

¹¹⁶ See *id.* at 9. The Commission gave examples of positive action programs that were not affected by the *Kalanke* decision, such as "quotas linked to the qualifications required for the job, as long as they allow account to be taken of particular circumstances which might, in a given case, justify an exception to the principle of giving preference to the underrepresented sex" and "plans for promoting women, prescribing the proportions and the time limits within which the number of women should be increased but without imposing an automatic preference rule when individual decisions on recruitment and promotion are taken." Communication on the *Kalanke* Ruling, *supra* note 61, at 9. It is interesting to note that in its discussion of positive action, the Commission referred to the relevant United States legislation and case law on affirmative action. See *id.* at 6.

¹¹⁷ See Case C-409/95, *supra* note 12.

¹¹⁸ *Id.* at 167.

¹¹⁹ See *id.*

¹²⁰ For the text of the articles of the ETD, see Council Directive 76/207, *supra* note 7.

The ECJ upheld the German law and recognized that positive action limited to "providing occupational training and guidance for women or . . . influencing the sharing of occupational and family responsibilities is not sufficient to put an end to . . . partitioning of labour markets."¹²¹ It held that Article 2(4) of the ETD authorizes national measures that are related "to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men"¹²² because "although discriminatory in appearance, [they] are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life."¹²³ The ECJ reasoned that based upon the experiences of Germany and other nations in the EU, just because a male and a female candidate may be equally qualified, it does not mean equal opportunities exist.¹²⁴ The ECJ noted:

[E]ven where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding.¹²⁵

Marschall reflects a major change regarding positive action from the *Kalanke* opinion which held that the guarantee of an equal starting point was sufficient.

The ECJ distinguished *Marschall* from *Kalanke* by noting that, although remedial in nature, the law in dispute did not guarantee priority to women over men as did the law in *Kalanke*.¹²⁶ The law's "sav-

¹²¹ Case C-409/95, *supra* note 12, at 168.

¹²² *Id.* at 169 (citing C-450/93, *Kalanke*, 1995 E.C.R. I-3501, [1996] All ER (EC) 66 (1995), ¶ 19).

¹²³ *Id.* (citing Case 312/86, *Commission v. France*, 1988 E.C.R. 6315, ¶ 15; *Kalanke*, 1995 E.C.R. I-3501, [1996] All ER (EC) 66 (1995), ¶ 18).

¹²⁴ *See id.* at 170.

¹²⁵ *Id.* at 169-70.

¹²⁶ Case C-409/95, *supra* note 12, at 169.

ings clause"¹²⁷ gave priority to women unless the male candidate had specific characteristics that tilted the balance in his favor.¹²⁸

In reaching this result, the ECJ rejected the opinion of Advocate General Jacobs,¹²⁹ who argued that the German law at issue was unlawful when read in light of the *Kalanke* opinion.¹³⁰ Advocate General Jacobs interpreted the holding of *Kalanke* to mean that any national rule which goes further than advancing "equal opportunities" by attempting to obtain "equal representation" is beyond the scope of Articles 2(1) and 2(4) of the ETD and hence unlawful.¹³¹

¹²⁷ The savings clause

provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate. In this respect, however, it should be remembered that those criteria must not be such as to discriminate against female candidates.

Id. at 170.

¹²⁸ *See id.* at 169.

¹²⁹ Advocate General Jacobs' opinion is not binding on the ECJ or Member States. *See German Sex Bias Rules*, *supra* note 97, at 29. Advocate General Jacobs reasoned that the savings clause of the national rule only displaced the rule granting women priority and did not change the "discriminatory nature of the rule." Opinion of Advocate General F.G. Jacobs, Case C-409/95, [1997] All ER (EC) 865 (1997), [1998] CEC (CCH) 152 (1997), at 161 [hereinafter Jacobs Opinion]. Further, Advocate General Jacobs stated that if an absolute rule granting women priority based on their sex is unlawful, then a "conditional rule which either gives priority to women on the ground of their sex or gives priority to men on the basis of admittedly discriminatory criteria must *a fortiori* be unlawful." *Id.* at 162.

¹³⁰ Advocate General Jacobs noted that the ETD had been promulgated almost twenty years before the decision at hand, and as such, believed social characteristics had been altered. *See id.* at 164. Any change in the ETD or subsequent legislation was a matter for the legislators, not the courts. *See id.* His proposal related to the concept of equal pay, not affirmative action, and therefore was not directly controlling. *See id.*

¹³¹ *See* Jacobs Opinion, *supra* note 129, at 161. Advocate General Jacobs commented on the scope of Article 2(4) of the ETD and posited some measures which may be permissible under the current applicable law. *See id.* at 163. One example of a permissible measure written in gender-neutral terms would be to grant an age-limit extension to candidates who have taken at least a year off work to rear a child, even if such a measure disproportionately benefits women. *See id.* In addition, certain measures enacted to eradicate specific disadvantages faced solely by working women are permissible under Article 2(4) irrespective of whether the language is gender-specific or gender-neutral. *See id.* Citing language from the decision in *Kalanke*, authored by Advocate General Tesauero, Advocate General Jacobs stated that "[p]ermissible directly discriminatory measures under art. 2(4) 'must therefore be directed at removing the obstacles preventing women from having equal opportunities by tackling, for example, educational guidance and vocational training.'" *Id.* Furthermore, Article 4(1) of the Convention on the Elimination of All Forms of Discrimination Against Women states that "temporary special measures" aimed at sexual equality are not discriminatory provided they "in no way entail as a consequence the maintenance

Despite Advocate General Jacobs' opinion, the *Marschall* decision did much to renew the permissibility of positive action programs within the EU by dispelling some of the uncertainty caused by the *Kalanke* decision.¹³² Nevertheless, commentators disagree on how to interpret the decision. The North-Rhine Westphalia Minister for Equal Opportunities for Men and Women was pleased with the outcome of *Marschall* and promoted quotas to permit gender discrimination favoring women where they are underrepresented in the job market.¹³³ Others contended that the *Marschall* ruling failed to clarify the conflict between the equality principle and provisions providing for positive action for the underrepresented sex.¹³⁴

C. Affirmative Action in the United States

Unlike the EU, the United States has stepped back from, rather than expanded, its commitment to affirmative action. The constitutionality and fairness of affirmative action programs have been the focus of ongoing debate in the United States for almost half a century. While most of the constitutional debate has centered on race-based affirmative action programs,¹³⁵ gender-based programs have also been affected. The same legal principles apply to both race-based and gender-based preferences, albeit in slightly different forms, because the relevant constitutional provision is the Equal Protection Clause of the United States Constitution.¹³⁶

of unequal or separate standards. . . . [T]hese measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved." Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, art. IV, ¶ 1, 1249 U.N.T.S. 13; see also Julie A. Mertus, *International Decision: Marschall v. Land Nordrhein-Westfalen*, 92 AM. J. INT'L L. 296, 297 (1998).

¹³² See Mertus, *supra* note 131, at 300.

¹³³ See *Equal Opportunities: Disagreements About How to Interpret Marschall Judgment*, EUR. REP., Jan. 28, 1998.

¹³⁴ See *id.*

¹³⁵ For Supreme Court cases using a heightened scrutiny for race-specific classifications, see *Batson v. Kentucky*, 476 U.S. 79 (1986); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *In re Griffiths*, 413 U.S. 717 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Korematsu v. United States*, 323 U.S. 214 (1944); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Strauder v. West Virginia*, 100 U.S. 303 (1879).

¹³⁶ Although the Equal Protection Clause applies only to actions of state governments, the Due Process Clause of the Fifth Amendment, which applies to the federal government, substantially embodies the equal protection guaranties of the Equal Protection Clause of the Fourteenth Amendment.

The Supreme Court's first substantive decision on affirmative action came in 1978 in *Regents of the University of California v. Bakke*.¹³⁷ The case concerned the constitutionality of a program mandating that sixteen seats be set aside each year in the state medical school for minority applicants.¹³⁸ The Court, though sharply divided, ruled that the state had a legitimate interest in achieving a diverse student body and could use race as a factor in the admissions process in order to achieve diversity.¹³⁹ However, the school's rigid two-track approach amounted to a quota and was unconstitutional.¹⁴⁰

After *Bakke*, the Court decided several other cases which involved the claim that affirmative action programs violated Title VII because they discriminated based upon race or gender. Unlike the EU approach, which specifically permits but does not require positive action programs, Title VII is silent with respect to affirmative action. It neither requires affirmative efforts on the part of employers to correct imbalances in the work force, nor prohibits the use of affirmative action programs to correct such imbalances.

In 1979, in *United Steelworkers Of America v. Weber*, the Court held that an affirmative action plan, which reserved 50% of future craft jobs for blacks, did not violate Title VII.¹⁴¹ The Court so held because the purpose of the plan mirrored the purpose of the Civil Rights Act and did not unnecessarily trammel the interests of white employees.¹⁴²

¹³⁷ 438 U.S. 265 (1978).

¹³⁸ *Id.* at 269-70.

¹³⁹ *Id.* at 362.

¹⁴⁰ *Id.* at 378.

¹⁴¹ See 443 U.S. 193 (1979). *Weber* challenged the legality of an affirmative action plan that was collectively bargained for by an employer and a union and that reserved for black employees 50% of job openings in an in-plant, craft-training program until the percentage of black craft-workers in the plant was commensurate with the percentage of blacks in the local labor force. See *id.* at 197. The Supreme Court ruled that Title VII of the Civil Rights Act of 1964 permitted employers and unions in the private sector to take such race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories. See *id.*

¹⁴² Justice Brennan explained that:

[t]he purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to "open employment opportunities for Negroes in occupations which have been traditionally closed to them." At the same time, the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hires. Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.

The goal of Title VII is twofold: to root out invidious discrimination against any person on the basis of race or gender and to eliminate the lasting effects of such discrimination.¹⁴³

The reasoning in *Weber* was applied in 1987 to a case brought by a male plaintiff who challenged the legality of using sex as a factor when deciding to promote an individual to the position of road dispatcher.¹⁴⁴ In *Johnson v. Transportation Agency, Santa Clara County, California*, an affirmative action plan for hiring and promoting minorities and women was voluntarily adopted by the Santa Clara County Transportation Agency.¹⁴⁵ The plan allowed the agency to consider the gender of a qualified applicant when making promotions to positions in a "traditionally" segregated job area where women had been "significantly underrepresented" at the time the plan was implemented.¹⁴⁶ The plan's long-term goal was to achieve a labor force that reflected the proportion of minorities and women in that respective area.¹⁴⁷ The plan did not set aside a specific number of positions for minorities or women.¹⁴⁸ Pursuant to the plan, a male employee, Johnson, was passed over for promotion in favor of a female employee, although both were rated as "qualified for the job."¹⁴⁹ Although no prior intent to discriminate was involved, the Court upheld the plan.¹⁵⁰ It noted that the plan was justified because of the manifest imbalance of women in traditionally segregated job categories.¹⁵¹ Additionally, the plan was temporary and did not mandate that women be given preference over men, only that gender could be considered as a factor.¹⁵²

During the past decade, however, affirmative action programs, particularly in the public sector, have faced an increasingly hostile Court. In 1989, in *City of Richmond v. J.A. Croson Co. (Croson)*, the Supreme Court applied strict scrutiny to affirmative action programs for the first time.¹⁵³ In *Croson*, the city of Richmond enacted a minority set-aside program for construction projects in which the city enter-

Id. at 208 (citations omitted).

¹⁴³ *See id.*

¹⁴⁴ *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616, 619 (1987).

¹⁴⁵ *See id.*

¹⁴⁶ *Id.* at 620-21.

¹⁴⁷ *Id.* at 620.

¹⁴⁸ *Id.* at 622.

¹⁴⁹ 480 U.S. 616, 623 (1987).

¹⁵⁰ *Id.* at 641-42.

¹⁵¹ *See id.* at 637.

¹⁵² *See id.* at 638-40.

¹⁵³ *See* 488 U.S. 469 (1989).

tained bids.¹⁵⁴ This program was enacted without any specific statistical proof of past discrimination.¹⁵⁵ The Supreme Court declared the plan unconstitutional.¹⁵⁶ In order for the program to pass constitutional muster, Richmond would have to show that a definite pattern of discrimination against a qualified minority contractor existed.¹⁵⁷ Writing for the Court, Justice O'Connor noted:

Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.¹⁵⁸

Further, Justice O'Connor found that:

[u]nder such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. . . . In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.¹⁵⁹

In evaluating federal race-based affirmative action programs, the Court in 1995, in *Adarand Constructors, Inc. v. Peña*, indicated that such programs, whether imposed by federal, state or local governments, will be subject to strict scrutiny.¹⁶⁰ The Court must be satisfied that a

¹⁵⁴ *Id.* at 477.

¹⁵⁵ *Id.* at 499.

¹⁵⁶ *Id.* at 511.

¹⁵⁷ *Id.* at 510-11.

¹⁵⁸ 488 U.S. 469, 509 (1989).

¹⁵⁹ *Id.* (citation omitted).

¹⁶⁰ 515 U.S. 200 (1995). This case involved the stipulation in the Small Business Administration regulations that most federal agency contracts must contain a subcontractor compensation clause, which gives a prime contractor a financial incentive to hire subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals, and requires the contractor to presume that such individuals include minori-

prior intent to discriminate has been proven, and thus, a compelling governmental interest to compensate for such discrimination exists.¹⁶¹ Further, the means adopted must be narrowly tailored to meet this goal.¹⁶² In the past, every governmental practice or program based on race has been struck down when viewed through the strict scrutiny lens. Indeed, the test has been characterized as "strict in theory, but fatal in fact" since once applied, the challenged practice has almost always been invalidated.¹⁶³

Of particular interest is a recent case, *Taxman v. Board of Education*,¹⁶⁴ which was scheduled to be decided by the Supreme Court in the 1997–98 term, but was dismissed because the litigants settled before argument. In *Taxman*, a white teacher who was dismissed because of a reduction in the work force due to budgetary restraints, brought suit against the school district.¹⁶⁵ It was stipulated that Taxman possessed qualifications equal to those of a black teacher who was retained.¹⁶⁶ The teachers were deemed equal in that they were both hired on the same day and were of "equal ability" with "equal qualifications," leaving race the only factor to distinguish between the teachers.¹⁶⁷ The white teacher was discharged because of the affirmative action plan previously adopted.¹⁶⁸ The Third Circuit Court of Appeals held that the plaintiff's layoff violated Title VII of the Civil Rights Act of 1964, because such an affirmative action program was used solely to promote diversity within the school system.¹⁶⁹ Diversity

ties or any other individuals found to be disadvantaged by the Small Business Administration. See *id.*

¹⁶¹ *Id.* at 277.

¹⁶² *Id.*

¹⁶³ Justice Ginsburg, with whom Justice Breyer joined in dissent, stated that "the strict standard announced is indeed 'fatal' for classifications burdening groups that have suffered discrimination in our society." *Id.* at 275. Justice O'Connor, however, noted that "we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" 515 U.S. 200, 237 (1995) (quoting Justice Marshall's concurrence in *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)). "[T]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country" is an unfortunate reality, and "[g]overnment is not disqualified from acting in response to [it]." *Id.* at 202.

¹⁶⁴ 91 F.3d 1547 (3d Cir. 1997), *cert. granted*, 117 S. Ct. 2506 (1997), and *cert. dismissed*, 118 S. Ct. 595 (1997).

¹⁶⁵ *Id.* at 1551–52.

¹⁶⁶ *Id.* at 1551.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ 91 F.3d 1547, 1567 (3d Cir. 1997), *cert. granted*, 117 S. Ct. 2506 (1997), and *cert. dismissed*, 118 S. Ct. 595 (1997).

itself, the Court said, cannot be considered a compelling state interest.¹⁷⁰

While the courts are clearly narrowing the scope of permissible affirmative action programs, affirmative action has also come under attack by state governments and citizen-initiated referenda. For example, California, Delaware and Texas, among other states, have implemented legislation which bans the use of preferences based on race, sex, ethnicity or national origin in any state program.¹⁷¹ At the federal level, the effectiveness of affirmative action programs has been effectively vitiated even though the affirmative action provisions of Executive Order 11246 technically continue to exist.¹⁷² In 1995, the Labor Department issued a policy stating that unlawful preferences and quotas will not be permitted in any government program. In-

¹⁷⁰ *Id.* at 1558.

¹⁷¹ See Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003 (1997). McGinley states:

The California Civil Rights Initiative, or, as it is commonly known, Proposition 209, resulted from public displeasure with affirmative action and was fueled by these groups. Proposition 209, which bans the use of preferences based on race, sex, color, ethnicity, or national origin, has inspired other state legislators from Delaware, Kentucky, Missouri, South Carolina, and Texas to enact similar legislation. Moreover, former Senator Bob Dole proposed a similar bill at the federal level.

Id. at 1036-37 (citations omitted).

¹⁷² See Clint Bolick, *Jurisprudence in Wonderland: Why Judge Henderson's Decision Was Wrong*, 2 TEX. REV. L. & POL. 59, 59-62 (1997); Mary J. Reyburn, *Strict Scrutiny Across the Board: The Effect of Adarand Constructors, Inc. v. Peña on Race-Based Affirmative Action Programs*, 45 CATH. U. L. REV. 1405, 1414-16 (1996).

President Lyndon B. Johnson furthered the federal commitment to equal employment opportunities in 1965 by signing Executive Order 11,246, requiring all federal agencies to establish equal employment plans. Since then, affirmative action programs have been embroiled in endless controversy. The legality of various aspects of the concept have culminated in multiple Supreme Court opinions. Unfortunately, the Court's decisions have failed to clarify the constitutionality of affirmative action programs.

Reyburn, *supra* note 172, at 1414-16. See also Stephen C. Simpson, *The Self-Critical Analysis Privilege In Employment Law*, 21 J. CORP. L. 577, 596 (1996) ("The controversy . . . is the potential 'chilling effect'—that companies will fail to develop voluntary plans or to comply with legislation such as Executive Order 11,246, or that they will do so with one eye on possible future litigation. Accordingly, their affirmative action goals may suffer."); U.S. Department of Labor, *Numerical Goals Under Executive Order 11246* ("In the context of Executive Order 11246, the Clinton administration's U.S. Department of Labor has taken the position that the requirement that federal contractors take affirmative action does not require preferential treatment, and that indeed in most instances preferential treatment is illegal.").

stead, the Department encouraged efforts focused on outreach programs designed to broaden the pool of qualified candidates.

Despite the fact that the Supreme Court sanctioned affirmative action programs more than thirty years ago, debate about the legitimacy and wisdom of such programs continues. Indeed, in attempting to evaluate the legality of specific programs, one is faced with an ever-changing legal landscape.

III. THE AMSTERDAM TREATY'S IMPACT ON POSITIVE ACTION IN THE EU

While the United States appears to be stepping back from its commitment to affirmative action to eliminate all vestiges of discrimination, the EU has been developing its own jurisprudence of positive action through directives, decisions of the ECJ, and now through specific provisions of the Amsterdam Treaty.¹⁷³

Although the EC Treaty focuses on economic integration rather than on human rights, the ECJ declared early on that respect for human rights is one of the general principles of Community law.¹⁷⁴ Furthermore, the TEU imposes an obligation on the EU to "respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."¹⁷⁵ The Amsterdam Treaty, signed by the Member States on October 2, 1997, and effective May 1, 1999, strengthens the EU's commitment to human rights in a number of ways and explicitly affirms that the identity of the EU is based on democracy and human rights.

The Amsterdam Treaty adds to the TEU an explicit statement that "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of

¹⁷³ EC TREATY, *supra* note 1, art. 141(3).

The Council, acting in accordance with the procedure referred to in Article 189b [now Article 251], and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

Id.

¹⁷⁴ *Defrenne III*, *supra* note 23, at 1378.

¹⁷⁵ TEU, *supra* note 14, art. 6.

law, principles which are common to the Member States.”¹⁷⁶ In addition, sanctions may be imposed on a Member State in cases of a “serious and persistent breach” of these principles.¹⁷⁷ The Amsterdam Treaty also adds the explicit requirement that “the Court, wherever it has jurisdiction, . . . apply these human rights standards in relation to acts of the institutions of the Union.”¹⁷⁸ This requirement adopts the ECJ principle that conformity with human rights standards is “a necessary condition for the lawfulness of Community acts.”¹⁷⁹

The Amsterdam Treaty is particularly important with respect to furthering equality between men and women throughout the EU and is a major step forward with respect to implementing equality in the work force. The Amsterdam Treaty goes beyond existing EU legislation regarding gender equality in employment and imposes a general obligation on the Union in all of its activities to eliminate inequalities and to promote equality. In addition to clarifying, developing and expanding the EC Treaty provisions on equality, the Amsterdam Treaty adopts the comparable worth concept first set out in the EPD and requires “equal pay for work of equal value.”¹⁸⁰

The Amsterdam Treaty also adds two new provisions to the Article 141 equality principle. The first provision requires the Council, under qualified majority voting, to adopt measures to ensure equal opportunity and equal treatment of men and women in employment.¹⁸¹ The second provision allows Member States to adopt and maintain positive action provisions. It states:

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.¹⁸²

¹⁷⁶ *Id.*

¹⁷⁷ See *White Paper*, *supra* note 9, at 3.2.

¹⁷⁸ *Id.* at 3.5.

¹⁷⁹ *Id.*

¹⁸⁰ See EC TREATY, *supra* note 1, art. 141.

¹⁸¹ See *id.* art. 141(3).

¹⁸² *Id.* art. 141(4). The term “underrepresented sex” replaces “women” found in EC Treaty Article 141.

Although the term "underrepresented sex" replaces the term "women" as the focus of positive action, a declaration by Member States stipulates that such action should in the first instance aim at improving the situation of women in working life.¹⁸³ This provision, therefore, implicitly rejects the holding of *Kalanke* that a positive action program is only permitted with respect to access to employment, instead permitting affirmative action with respect to other aspects of employment activities.

Finally, the Amsterdam Treaty expands the scope of the equality principle and allows the Council to take action against discrimination based on sex, race or ethnic origin, religion or belief, disability, age, or sexual orientation within the limits of its powers. Given the ever-expanding scope of Community activities, the Council is vested with broad authority to combat discrimination.

These amendments, declarations, requirements and provisions¹⁸⁴ afford greater flexibility to the equality principle and should influence the ECJ in future cases. They affirm the EU's commitment to promote equality between men and women in employment as well as in general. It is clear that Member States may use positive action to promote equality between men and women in employment, not only with respect to access to employment but also with respect to all other aspects of employment.

Although the *Kalanke* and *Marschall* quandaries have been resolved, other issues remain to be addressed. The Amsterdam Treaty encourages Member States to make progress in the field of equal treatment between men and women in employment, but implementation of the equality principle by Member States has been problematic in the past. The Amsterdam Treaty gives little guidance for the future concerning measures the Council will adopt to ensure the application of nondiscrimination in employment, and while Member States may implement positive action programs, they are not required.

CONCLUSION

The EU has benefited from what began as an economic incentive—"equal pay for equal work"—and has eventually evolved this

¹⁸³ Declaration on Article 119(4) [now Article 141(4)] of the Treaty Establishing the European Community, Amsterdam Treaty, *supra* note 1, decl. 28.

¹⁸⁴ The Amsterdam Treaty also includes a declaration to Article 141 which states: "[w]hen adopting measures referred to in Article 119(4) [now Article 141(4)] of the Treaty establishing the European Community, Member States should, in the first instance, aim at improving the situation of women in working life." *Id.*

concept into a social commitment to equality between men and women in employment and in all other areas of Union activity. The Amsterdam Treaty greatly raises the awareness of the issues regarding discrimination between men and women in employment as well as beyond the workplace and allows Member States to enact appropriate legislation. But experience with the EPD and the ETD indicates that implementation is the key. As a result, Member States will likely continue to need prodding from the ECJ and the Commission to fully implement the new equality provisions of the Amsterdam Treaty. In addition, the Council itself will need to be encouraged to take the necessary action to fully implement the nondiscrimination provisions of the Amsterdam Treaty. Although there is much potential for furthering equality in the EU, there is no guarantee that effective action will be taken or that the provisions have gone far enough.